

Federal Communications Commission

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DA 01-1787Before the
Federal Communications Commission
Washington, D.C. 20554

2001 JUL 30 P 1: 29

In the Matter of

Amendment of Section 73.202(b),
Table of Allotments,
FM Broadcast Stations.
(Danville and Nonesuch, Kentucky))
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)MM Docket No. 01-169
RM-10145 ✓

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NOTICE OF PROPOSED RULE MAKING

Adopted: July 18, 2001

Released: July 27, 2001

Comment Date: September 17, 2001

Reply Date: October 2, 2001

By the Chief, Allocations Branch

1. The Commission has before it for consideration a Petition for Rule Making filed on behalf of Clear Channel Broadcasting Licenses, Inc. ("Clear Channel"), licensee of Station WHIR-FM, Channel 296A, Danville, Kentucky, requesting the reallocation of Channel 296A from Danville, Kentucky, to Nonesuch, Kentucky. Clear Channel requests modification of its license for Station WHIR-FM to specify operation on Channel 296A at Nonesuch, Kentucky. Clear Channel indicated that it would file an application for Channel 296A at Nonesuch if the channel is allotted to the community.

2. Clear Channel filed its request pursuant to Section 1.420(i) of the Commission's Rules which permits the modification of a station's authorization to specify a new community of license without affording other interested parties an opportunity to file competing expressions of interest. See Modification of FM and TV Authorizations to Specify a New Community of License ("Change of Community R&O"), 4 FCC Rcd 4870 (1989), recon. granted in part ("Change of Community MO&O"), 5 FCC Rcd 7094 (1990). In support of its proposal, Clear Channel contends that adoption of its proposal will result in a preferential arrangement of allotments by providing Nonesuch, Kentucky, with its first local service while not depriving Danville, Kentucky, of its own local service as Station WHIR(AM) and NCE Station WDFB-FM are licensed to Danville as is television station WDKY-TV.

According to Clear Channel, the proposal will more than triple the number of persons served by Station WHIR-FM, with a net gain of 240,000 persons. In addition, the proposal will eliminate existing short-spacings between Station WUHU(FM), Smiths Grove, Kentucky and Station WCTT-FM, Corbin, Kentucky. Clear Channel contends that Nonesuch is a community established in the late 19th century, centered around the junction of Cummins Ferry and Fords Mills Road in southern Woodford County. Clear Channel states that Nonesuch is a community of more than 50 homes, has several retail businesses, a restaurant and local general store and that Woodford County Government

has designated Nonesuch as a seat of a voting precinct and identifies a county fire department in the area as the Nonesuch branch.

3. We initially believe that Clear Channel's proposal warrants consideration since the reallocation of Channel 296A could provide the community of Nonesuch with its first local broadcast service while not depriving Danville of its sole local aural service. A staff engineering analysis indicates, using Clear Channel's proposed site, that the channel can be allotted to Nonesuch in compliance with the Commission's spacing requirements and that city grade coverage will be provided to the community. Our analysis shows that the loss area of Channel 296A at Danville contains 23,704 people in 1,181 square kilometers while the gain area for Channel 296A at Nonesuch contains 223,489 people in 1,181 square kilometers. We further show that the proposed facility for Station WHIR-FM at Nonesuch covers only 1.4% of the Lexington-Fayette, Kentucky Urbanized Area with the 70 dBu contour. The 1990 Census credits Danville with a population of 12,420 people but does not provide a listing for Nonesuch. While Nonesuch can be located on some maps, staff research failed to locate any information supporting community status for Nonesuch.¹ Therefore, Clear Channel is requested to provide evidence supporting its assertion that Nonesuch qualifies as a community for allotment purposes. See Kenansville, Florida, 10 FCC Rcd 9831 (1995).

4. Channel 296A can be allotted to Nonesuch, Kentucky, in compliance with the Commission's minimum distance separation requirements at Clear Channel's specified site.² The proposed site is located 12.9 kilometers (8.0 miles) southeast of the community of Nonesuch.. In accordance with Section 1.420(i) of the Commission's Rules, we shall not accept competing expressions of interest for the use of Channel 296A at Nonesuch.

5. In view of the fact that the proposed allotment could provide a first local FM service to Nonesuch, Kentucky, if Nonesuch is determined to be a community, without depriving Danville, Kentucky, of its sole local service, we believe it would serve the public interest to solicit comments on the proposal to allot Channel 296A to Nonesuch, Kentucky. Therefore, we will seek comments on the proposed amendment to the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to Danville and Nonesuch.

¹ Generally, if a community is incorporated or located in the U.S. Census, that is sufficient to satisfy its status. Absent such recognizable community factors, the petitioner must present the Commission with sufficient information to demonstrate that such a place has social, economic, or cultural indicia to qualify it as a community for allotment purposes. Although Clear Channel indicated there are some businesses in Nonesuch, it has not identified those entities with addresses or shown that they are intended to serve residents of Nonesuch as opposed to other areas. Clear Channel should show that the organizations, civic groups, churches, schools, police, etc., have a nexus with Nonesuch.

² The coordinates for Channel 296A at Nonesuch are 37-50-12 and 84-38-15.

Community	Channel No.	
	Present	Proposed
Danville, Kentucky	296A	-----
Nonesuch, Kentucky	-----	296A

6. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

7. Interested parties may file comments on or before September 17, 2001, and reply comments on or before October 2, 2001, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D. C., 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

F. William LeBeau
Hogan & Hartson L.L.P.
555 Thirteenth Street, N.W.
Washington, D. C. 20004

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules, 46 FR 11549, February 9, 1981.

9. For further information concerning this proceeding contact Kathleen Scheuerle, Mass Media Bureau, (202) 418-2180. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no ex parte presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the commission or review by any court. An ex parte presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on

the petitioner constitutes an ex parte presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an ex parte presentation and shall not be considered in this proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204.(b) and 0.283 of the Commission's Rules, **IT IS PROPOSED TO AMEND** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the Notice of Proposed Rule Making to which this Appendix is attached.

2. Showings Required. Comments are invited on the proposal(s) discussed in the Notice of Proposed Rule Making to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. Cut-off Procedures. The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules).

(b) With respect to petitions for rule making which conflict with the proposal(s) in this Notice, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. Comments and Reply Comments; Service. Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the Notice of Proposed Rule Making to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties, must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D. C. 20554.

5. Number of Copies. In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. Public Inspection of Filings. All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 445 Twelfth Street, SW, Washington, D. C. 20554.